In the Supreme Court of the United States.

DECEMBER TERM, 1867.

JOHN H. McKEE, claimant of 137 Bales of Cotton and other property, appellant,
vs.
UNITED STATES.
No. 111.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

STATEMENT OF THE CASE.

This is a claim for a portion of the property captured by the naval forces of the the United States, under the command of Admiral D. D. Porter, engaged in the "Red River Expedition," in the spring of 1864. The particular property embraced by the claim was seized on March 16, 1864, in the town of Alexandria, on the Red River, Louisiana, and brought into the southern district of Illinois for adjudication with the other property captured upon the same expedition.

The claimant is John H. McKee, a citizen and resident of New Orleans, who is represented by his "duly

authorized agent," Wellington W. Withenbury. This agent is one of the claimants of the 935 bales of cotton which are the subject of the appeal in No. 112. His principal, John H. McKee, is the person who appears in that case (No. 112) as a witness on behalf of Withenbury & Doyle.

The claim and affidavit, both signed and sworn to by Withenbury, are on pages 20 and 21 of the Record; and they allege that the property for which claim is made, on behalf of John H. McKee, was purchased by that party from Andrew W. McKee, to whom it belonged individually, and was held at the time of its capture by a warehouseman in Alexandria, Adolph Rachal, for the sole benefit of the claimant.

The District Court, on the 6th of November, 1865, dismissed the claim, and from that decree the present appeal is taken.

THE FACTS.

I. John H. McKee, the claimant, was a citizen of New Orleans, and a member of the mercantile firm of C. A. Weed & Co., extensively engaged, as it appears, at the time of these transactions, in the purchase of the products of the rebel States. He was a native of Wheeling, Virginia, and an adopted son of an uncle of Andrew W. McKee, (Rec. p. 34,) the agent of the rebel Treasury Department for the purchase of cotton, and the party who appears as the chief witness of Withenbury & Doyle in case No. 112. The theory of the relationship between the McKees and the claimants, Withenbury & Doyle, advanced in the argument in that case, is further supported by the testimony contained in this record.

The claimant here is not only represented for the

purposes of a claim by Wellington W. Withenbury, but that person, as well as his co-claimant, Ross W. Doyle, with Andrew W. McKee and Adolph Rachal, a clerk of A. W. McKee, are the principal witnesses in the present case.

2. It is alleged that Andrew W. McKee, the rebel cotton agent, being individually the owner of 147 bales of cotton, and the other property mentioned in the claim, which were stored at Alexandria in the warehouse of Adolph Rachal as the private property of A. W. McKee, sold the same to John H. McKee, on March 4, 1864, in Point Coupée Parish, near Waterloo, within the confederate military lines, for the sum of $18,375 00 in "green-backs," and delivered to John H. McKee an order upon the warehouseman for the property. (Rec. pp. 33, 34, 41.) Possession was never taken by John H. McKee of the property, and on the 16th of March, twelve days after the alleged sale, it was captured by Porter's fleet.

3. This transaction between the McKees occurred, as would appear, on the occasion of the visit made by the claimant and Ross M. Doyle during the first four or five days in March 1864, to Andrew W. McKee, who was at Waterloo, for the purpose of getting out of the rebel lines the 2,500 bales alleged to have been owned by Withenbury & Doyle, and carrying into execution the agreement, dated January 30, 1864, between Col. S. B. Holabird and John H. McKee, printed on pages 82, 83 of Record No. 112. This agreement, as it will be remembered, had reference to the bringing to New Orleans of all the cotton belonging to the rebel government, obtainable by John H. McKee. The agreement, we learn from the testimony in Record No. 112, was carried by J. H. McKee

and Doyle from New Orleans to Waterloo, where they met A. W. McKee.

John H. McKee states that, in addition to this document, he had in his possession, when he left New Orleans and met his cousin at Waterloo, a permit authorizing him to purchase property, on his own account, in the rebel lines, signed by General Banks or Brigadier General Brown, Provost Marshal General of the Department of the Gulf, and that it was under *this* permit, purely military in its character, that he purchased the 137 bales of cotton, now claimed, from A. W. McKee at Waterloo. (Rec., pp. 36, 37.) This permit is not produced. The claimant swears that all such permits were afterwards annulled by General Canby in August, 1864, on assuming command at New Orleans, and that the particular permit under which he acted, in buying the property now claimed, was lost or mislaid.

He further swears that this permit was given him in order to serve as a cover for the real transaction he had on hand for the U. S. military authorities. (Rec., p. 37.) Doyle swears the same thing. (Ibid.) The "real transaction," probably, was the execution of the agreement of January 30, 1864, just referred to.

It thus appears that the claimant, John H. McKee, in carrying on the intercourse with A. W. McKee, which resulted in the purchase of this property, acted under the supposed authority of a permit or license granted by General Banks, without the agency or concurrence of any officer of the Treasury Department.

The further fact appears, that John H. McKee had in his possession "*several*" treasury permits, on the

occasions of this visit to A. W. McKee. (Rec., p. 39.) But it is not asserted by him that any of these were employed in the transaction with A. W. McKee, in which *this* property was purchased. (Rec., p. 36, 37.)

4. As to the question of the ownership of the property which A. W. McKee purported to sell to John H. McKee on this occasion, grave doubt is suggested by the general facts which are disclosed in the records of the other cases before the court, and particularly by the relations of the warehouseman Rachal to the Rebel Government and to the cotton agent, the alleged vender of the property now claimed. It is more than *probable*, under the facts of the cases, that McKee, on this occasion, sold the property of the Confederate Government, just as it is *certain* that in the case of Withenbury & Doyle he disposed of the property of that Government without any color of authority whatever.

Rachal, it appears, was a clerk in the Alexandria COTTON AGENCY, as well as a general warehouseman. (Rec., No. 112, p. 112.) His warehouse was used as a place for the storage of the public cotton of the Rebel Government; and it is probable that it was employed by his chief, A. W. McKee, in the prosecution of his duties as purchasing agent of that government. (Rec., p. 32.)

There is not the slightest evidence in this record of the ownership of this property by A. W. McKee; when he purchased it, from whom, and under what circumstances, are facts not even attempted to be shown by the claimant; while the character of this man Rachal, as the public warehouseman of the rebel government, indicates pretty clearly that the prop-

erty was held by him on behalf of the Rebel Government, and not on behalf of A. W. McKee.

THE LAW.

The law applicable to the foregoing state of facts deprives the present claim of all validity. The learned district judge, in deciding the case, says, "the proof tends to show that he (John H. McKee) had a license to trade in insurgent territory, issued under the provisions of the act of July 13, 1861." If the learned judge is correctly understood as affirming that there is any evidence in the record that the property now in controversy was purchased under a permit issued by any officer or person having authority in virtue of the Regulations of the Secretary of the Treasury, approved by the President under the act of July 13, 1861, to issue permits or licenses to trade with the rebel districts, he is certainly in error. The Regulations of the Treasury Department, approved by the President, under the act of July 13, 1861, in force at the date of this purchase, were those of September 11, 1863; and by the VII of those Regulations it was provided that "*commercial intercourse with localities beyond the lines of military occupation by the United States forces is strictly prohibited.*" The permit, under which John H. McKee traded with A. W. McKee, was not only employed beyond the "lines of military occupation of the United States;" but it did not purport to be issued by any officer of the Treasury Department having authority to license commercial intercourse under the Regulations of that Department in force at this date.

It was issued, as the claimant himself states, by General Banks or his Provost Marshal General. No

Treasury officer or agent had anything to do with it. It was an affair altogether outside of the trade regulations then in force. It was a military permit, with which the civil officers at New Orleans had nothing whatever to do. It did not profess to be issued under or in virtue of the act of July 13, 1861, for no military officer had any color of authority, under that act, or any Regulation of the Treasury Department in pursuance of it, to license commercial intercourse with the insurgent districts. In no just sense can it be said, that the permit, by which this purchase is sought to be protected, was issued under the act of July 13, 1861.

This being the state of the case in regard to the permit set up by Mc Kee in his defence, the following propositions appear to be indisputable:

First. *That the purchase of this property by John H. McKee was in direct violation of the act of July* 13, 1861, *and no title thereto was acquired by him.*

Andrew W. McKee, the vendor, was a citizen of the insurrectionary portion of Louisiana, while his vendee, John H. McKee, was a citizen and resident of New Orleans, The parties were not competent to make a contract in respect to property without the license of the President, granted under the lawful regulations of the Secretary of the Treasury. Any contract attempted to be made without such license was null and void. The parties had no legal capacity to trade with one another.

It has been already fully shown that no such license appears in the case. General Banks had no more authority to protect their trade, by a permit or license of his own, than any private citizen in New Orleans.

SECOND. *That independently of any question as to the character and validity of the license held by the claimant, no title could be acquired to any property owned by Andrew W. McKee, at the date of this transaction, by purchase, transfer, or conveyance from him.*

A. W. McKee was an officer or agent of the Government of the so-called Confederate States, and as such, all property owned by him was confiscable under the 5th section of the act of July 17, 1862; and by the same section, any sale of such property by McKee was, as a transfer of legal title, utterly void.—(12 Statutes, 591.)

In so far as the Confiscation Act of July 17, 1862, invalidated all sales and transfers of property belonging to persons within the 5th and 6th sections of the act, it must be regarded as a repeal by implication of the provisions of the act of July 13, 1861, which authorized the President to license commercial intercourse with such persons. If, therefore, the claimant had held a license duly issued under the authority of the President, at the time he purchased this property from A. W. McKee, such license would not have enabled him, at the date of that transaction, to acquire a valid title to the property as against the provisions of the Confiscation Act of July 17, 1862, referred to. They declared that any sale, transfer, or conveyance of any property belonging to the vendor should be absolutely, and to all intents and purposes whatever, *null and void*; and it is plain, therefore, that they repealed the provisions of the earlier Act of July 13, 1861, to the extent that they authorized the President to validate commercial intercourse with this vendor, and the acquisition of property by purchase from him.

On the foregoing propositions of law the whole case rests. They are too clear to need elaboration, especially, as the general subject of the effect of the Acts of 1861 and 1862 is fully discussed in the Brief of the United States, filed in Nos. 112 and 246.

HENRY STANBERY,
Attorney General.
J. HUBLEY ASHTON,
Special Counsel of United States.

APPENDIX.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

UNITED STATES

vs.

137 BALES OF COTTON—JOHN H. MCKEE, CLAIMANT.

HON. SAMUEL H. TREAT, JUDGE.

Opinion of the Court.

On the 16th of March, 1864, the United States Navy seized 137 bales of cotton and a lot of rope, bagging, and leather, on the bank of the Red River, in Louisiana. The proceeds of this property are now claimed by John H. McKee. The proof shows this state of the case: The claimant has been a resident of New Orleans since the commencement of the rebellion. The cotton, rope, bagging, and leather were the individual property of A. W. McKee, a resident of upper Louisiana, and, from October, 1862, to the fall of 1864, the general agent of the treasury department of the Confederate States, to purchase and dispose of cotton in the State of Texas and that part of Louisiana lying west of the Mississippi river. The claimant purchased the property in question of A. W. McKee, on the 4th of March, 1864. The proof tends to show that he had a license to trade in insurgent territory, issued under the provisions of the act of July 13, 1861. And had he permission from the commander of the United States forces in the Department of the Gulf to pass through the United States lines into upper Louisiana, and bring away any property that he might there purchase.

Section 5 of the act of Congress of July 17, 1862, provides "that, to insure the speedy termination of the present rebellion, it shall be the duty of the President of the United States to cause the seizure of all the estate and property, money, stocks, credits, and effects of the persons hereinafter named in this section, and to apply and use the same, and the proceeds thereof, for the support of the army of the United States." The enumeration of persons includes "any person hereafter holding an office or agency under the government of the so-called Confederate States of America." And the section thus concludes: "and all sales, transfers, or conveyances of any such property shall be null and void; and it shall be a sufficient bar to any suit brought by such person for the possession or use of such property, or any of it, to allege and prove that he is one of the persons described in this section."

A. W. McKee accepted and held an important official position from the government of the Confederate States after the passage of this statute. And he continued to hold that position when he transferred the property in question. The statute was therefore strictly applicable to him and the property. It deprived him of the power of making any valid disposition of the property. It expressly declared any sale or transfer to be void. In this state of the case it is very clear that the claimant acquired no title. His purchase was simply void, because A. W. McKee had no capacity to dispose of the property.

The claimant's license gave him no right to deal in this property. A statute subsequent in date to the one under which his license issued prohibited any sale or transfer of the property. The provisions of the act of July 13, 1861, so far as they are in conflict with those of the act of July 17, 1862, must give way. It is a familiar principle of law, that where two statutes are inconsistent with each other, the latter statute must prevail. To the extent of the repugnance between them, the latter statute is a modification or

repeal of the former. If, therefore, the license issued under the act of July 13, 1861, in terms authorized the claimant to trade generally within insurgent territory, the act of July 17, 1862, must be considered as restricting that authority to the property of those holding no official relation to the government of the Confederate States.

The claim must be dismissed.

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